BEFORE THE DEPARTMENT OF ENVIRONMENTAL QUALITY
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 17.86.101, 17.86.102, 17.86.105, 17.86.106, 17.86.107, 17.86.110, 17.86.111, 17.86.112, 17.86.115, 17.86.116, 17.86.117, 17.86.120, 17.86.121, and 17.86.122 pertaining to Wind Generation Facility and Solar Facility Decommissioning and Bonding	NOTICE OF AMENDMENT (ENERGY)

TO: All Concerned Persons

1. On February 14, 2020, the Department of Environmental Quality published MAR Notice No. 17-409, pertaining to the public hearing on the proposed amendment of the above-stated rules at page 231 of the 2020 Montana Administrative Register, Issue No. 3.

2. The department has amended ARM 17.86.101, 17.86.105, 17.86.106, 17.86.107, 17.86.110, 17.86.111, 17.86.112, 17.86.115, 17.86.116, 17.86.117, 17.86.120, 17.86.121, and 17.86.122 exactly as proposed.

3. The department has amended ARM 17.86.102 as proposed but with the following changes from the original proposal, stricken matter interlined and new matter underlined:

17.86.102 OWNER RESPONSIBILITIES (1) through (5) remain as proposed.

(6) Department representatives shall comply with site safety and general access restrictions while at the facility. The department and the owner shall confer and arrange a time for an inspection. The department shall confirm the scope, date, and time of the inspection to the owner in writing at least ten business days prior to the inspection. At the date and time arranged, a representative of the department may enter and inspect a facility to evaluate the adequacy of a new or updated decommissioning plan and the associated bond amount. The owner shall allow the department's representative to inspect the facility and shall accompany the representative.

4. The following comments were received and appear with the department's responses:

COMMENT NO. 1: The proposed rule amendments are contrary to the stated purpose of the department's Energy Bureau, which is to "promote renewable and alternative energy forms." The proposed amendment to ARM 17.86.107(5) creates a sudden, new, significant, and negative impact on Invenergy, the owner of the Judith Gap Project. To the extent that the new rules target the Judith Gap Project,

the rules are improper and prejudicial.

RESPONSE: In 75-26-310, MCA, the Montana Legislature gave the department authority to adopt rules implementing 75-26-301 through 75-26-310, MCA. These statutory provisions require the owners of wind and solar facilities to submit decommissioning plans and bonds conditioned on the faithful decommissioning of the generation facilities. The rule amendments being adopted by the department implement these requirements. The Judith Gap Project is not being targeted as the rules adopted by the department apply to all wind generation facilities that have a nameplate capacity greater than or equal to 25 megawatts and all solar generation facilities that have a cumulative nameplate rated generating capacity of 2 megawatts or more, as defined by the statute at 75-26-301(7) and (8), MCA.

COMMENT NO. 2: Adoption of rule amendments presents an important policy consideration in terms of how the department treats existing wind energy owners and how the department considers the economic impact to those small businesses.

RESPONSE: In 75-26-310, MCA, the Montana Legislature gave the department authority to adopt rules implementing 75-26-301 through 75-26-310, MCA. How the department treats existing and new wind and solar generating facilities is set forth by the Montana Legislature within those statutory provisions. In regard to economic impact on small businesses, see response No. 10.

COMMENT NO. 3: The proposed rule amendments are inconsistent with the rulemaking process to date, which was publicized as having to do with solar facilities and not wind facilities.

RESPONSE: Many of the proposed rule amendments were reasonably necessary because of the Montana Legislature's enactment of SB 93 which extended decommissioning plan and decommissioning bond requirements to solar energy generating facilities. Other proposed rule amendments were not based on enactment of SB 93. The statement of reasonable necessity that was included in the notice identified the proposed amendments that are based on the enactment of SB 93. For example, in regard to ARM 17.86.107, the proposed amendments to (1) through (3) were based, in part, on the need to expand the rule to solar energy generating facilities, reflecting enactment of SB 93. The proposed amendments deleting current (4) and adding a new (4) and (5) were not so identified. The proposed amendments deleting current (4) and adding a new subsection and (5) were born out of concerns expressed at a stakeholder meeting about the potential for the current (4) to exempt an entire facility from bonding when only a portion of the facility was covered by a state lease and bond.

COMMENT NO. 4: The proposed rule amendments are contrary to HB 216 enacted in 2017. Specifically, the proposed rule amendments conflict with 75-26-304(8)(a), MCA. That statutory provision provides a clear limit on the department's bonding authority, specifying that no additional bond is necessary if "the owner posts a bond with a federal agency, with the department of natural resources and conservation for the lease of state land, or with a tribal, county, or local government."

The 2017 Legislature did consider that "portion" of a facility was subject to private ownership in 75-26-308(8)(b), MCA, (now 8(c)) but did not do so in the exemption that applies to facilities that post a federal or state bond.

RESPONSE: The commenter is reading into 75-26-304(8)(a), MCA, language that is not included in that provision. Subsection (5) of 75-26-304, MCA, requires the owner of a wind generation facility or solar facility to submit a bond payable to the state of Montana that is conditioned on the faithful decommissioning of the wind generation facility or solar facility. Section 75-26-301(7), MCA, defines "solar facility," in part, to mean an installation or combination of solar panels or plates, including a canopy or array, that captures and converts solar radiation to produce electricity. Section 75-26-301(8), MCA, defines "wind generation facility," in part, to mean any combination of a physically connected wind turbine or turbines, associated prime movers, and other associated property, including appurtenant land and improvements and personal property, that are normally operated together to produce electric power from wind. Under (8)(a), an owner of a wind generation facility or solar facility is exempt from submitting the bond if the owner posts the bond with a federal agency, with the department of natural resources and conservation for the ease of state land, or with a tribal, county, or local government. The purpose of (8)(a) is to avoid the owner from having to double bond for decommissioning of the facility -- having to submit to the department a decommissioning bond for the facility under 75-26-304(5), MCA, when the owner has already posted a decommissioning bond for the facility with a federal, different state agency, or other tribal, county or local government. If 75-26-304(8)(a), MCA, were to be construed to exempt an owner from posting a decommissioning bond for the entire facility when only a smaller portion of the decommissioning costs are covered by a bond posted with a different governmental entity, the overarching requirement of 75-26-304(5), MCA, would not be met. The owner of the wind generating facility or solar facility would not have submitted a decommissioning bond conditioned on the faithful decommissioning of the facility.

COMMENT NO. 5: The proposed rule amendments exceed the department's authority because no statutory provision in 75-26-301 through 75-26-310, MCA, allows the department to break facilities "into portions" for separate bonding determinations.

RESPONSE: Please see response No. 4.

COMMENT NO. 6: Wind and solar facilities can be hundreds or thousands of acres in size. While facilities will sometimes be located entirely on either private, state, or federal land, facilities may have mixed ownership. Decommissioning plans and bonds must be sufficient to cover decommissioning of the entire project, not just portions of the project. For example, if a wind or solar facility is sited on 4,500 acres of private land and 500 acres of state land, the decommissioning cost of the entire project is $5 million, and the facility submits bond of $50,000 related to the use of state land, the facility should be subject to further bonding requirements so that the total bond posted reflects the cost of decommissioning the entire facility.

RESPONSE: The department agrees with this comment.

COMMENT NO. 7: The proposed rule amendments are contrary to SB 93, which was concerned with adding solar facilities, not changing the requirements for wind facilities.

RESPONSE: Please see response No. 3.

COMMENT NO. 8: The proposed rule amendment adding (5) to ARM 17.86.107 conflicts with 75-26-304(1)(c), MCA. Subsections (b) and (c) were added by SB 93 and contemplate different treatment of wind facilities existing prior to May 7, 2019 that have already submitted information and those commencing after May 7, 2019 that have not submitted bonding information. So even if a new wind generating facility located on state land and private land is required going forward to post separate bond for the portion on state and the portion on private land, that requirement should not apply to an existing wind generating facility.

RESPONSE: An existing wind generating facility would be subject to 75-26-304(1)(b), MCA, which states that the owner of a wind generating facility that began commercial operation prior to the effective date of SB 93 is required to submit a decommissioning plan and information necessary for the department to determine bond requirements on or before July 1, 2020. An exception to this requirement is set forth in 75-26-304(1)(c), MCA. Under that provision, the owner of a wind generating facility that began commercial operation prior to the effective date of SB 93 that has already provided the decommissioning plan and bond information is not required to resubmit the information.

COMMENT NO. 9: Section 75-26-304(1)(a) and (c), MCA, do not create an exemption for existing facilities from new bonding requirements. These provisions provide that if an existing facility has already submitted a decommissioning plan to the department then that plan is not required to be resubmitted to the department. These provisions do not create an exemption for posting a bond with the department.

RESPONSE: The department agrees with this comment.

COMMENT NO. 10: An economic impact analysis was required under 2-4-111, MCA, but not prepared for the proposed rule amendments. The economic impact is a large and unique concern for wind farms such as the Judith Gap Project.

RESPONSE: Under 2-4-111, MCA, the department is required to determine if the rule will significantly and directly impact small businesses. A small business is defined in 2-4-102(14), MCA, to be a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees. DEQ did not identify any owners of wind or solar generating facilities that met the statutory definition of a "small business." Invenergy LLC's website does not differentiate between separate business entities. It states that Invenergy has "100 projects in development across the U.S., Canada, Europe, Japan and Latin America." https://invenergyllc.com/who-we-are/overview (reviewed April 7, 2020). Invenergy's LinkedIn website indicates that "Invenergy is a leading global privately-held developer and operator of sustainable energy solutions. We are headquartered in the U.S. and have 1000 + employees across the Americas, Europe and Asia." https://www.linkedin.com/company/invenergy-llc (reviewed April 7, 2020).

COMMENT NO. 11: SB 93 contains a savings clause stating SB 93 "does not affect rights and duties that matured . . . before" the effective day of SB 93. The department may not require the Judith Gap Project to submit bond for the portion of the project located on private land because SB 93 is not intended to affect rights and duties that matured prior to its effective date.

RESPONSE: As indicated in response No. 3, the proposed amendments deleting current (4) and adding a new (4) and (5) are not being made to implement SB 93. Rather, they are being made to address concerns expressed at a stakeholder meeting about the potential for the current (4) to exempt an entire facility from bonding when only a portion of the facility was covered by a state lease and bond. Because these amendments are not being made to implement SB 93, the savings clause contained in that legislation is not applicable.

COMMENT NO. 12: SB 93 included an exemption that protects an existing wind facility from new bonding requirements. Under 75-26-304(1)(c), MCA, if a wind facility commenced operation before May 7, 2019 and submitted bond before July 1, 2018, the facility need not submit additional bond.

RESPONSE: Assuming that the owner of a wind generating facility that began operation prior to the effective date of SB 93 had previously provided a sufficient decommissioning plan and sufficient information for DEQ to calculate a decommissioning bond for the facility, the owner would not need to resubmit this information under 75-26-304(1)(c), MCA. See response No. 4.

COMMENT NO. 13: Ninety days does not allow adequate time to commence decommissioning activities after abandonment. This time period must consider the time required to procure a decommissioning contractor and seasonal weather impacts. North Dakota rules require owners to begin decommissioning within 12 months of abandonment.

RESPONSE: Under ARM 17.86.101(1), a wind generating facility or a solar facility is considered abandoned when it generates 10 percent or less of its monthly maximum generation potential for each month for twelve consecutive months. This twelve-month period allows time for an owner to begin preparation for decommissioning of the facility. Moreover, an owner may obtain an extension of the three-month period to begin decommissioning following abandonment by receiving the department's approval of an alternative plan for decommissioning. The rule amendment as proposed encourages early communication between an owner and the department following abandonment of a facility.

COMMENT NO. 14: Montana-Dakota Utilities Co. requires visitors to comply with site safety and general access restrictions while at its facilities. While the original rule language addressed this concern, it is proposed to be deleted in the amendment to ARM 17.86.102(6).

RESPONSE: The department agrees with this comment. The final amendment to ARM 17.86.102(6) does not delete the requirement that department staff comply with site safety and general restrictions while at a facility.

COMMENT NO. 15: Neighboring states have allowed regulated public facilities to be exempt from decommissioning bonding requirements. For regional consistency and to lessen potential impacts of future economic development in Montana, a bonding exemption should be added for public utilities.

RESPONSE: In 75-26-310, MCA, the Montana Legislature gave the department authority to adopt rules implementing 75-26-301 through 75-26-310, MCA. Rules adopted by the department must be consistent with these statutes. No provision in these statutes exempts regulated public utilities from decommissioning bond requirements and, therefore, the department does not have authority to do so via administrative rulemaking.

Reviewed by:

DEPARTMENT OF ENVIRONMENTAL QUALITY

/s/ Angela Colamaria
ANGELA COLAMARIA
Rule Reviewer

BY: */s/ Shaun McGrath*
SHAUN McGRATH
Director

Certified to the Secretary of State, May 19, 2020.